BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY KELLEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,672
SCHUFF STEEL	)	
Respondent	)	
AND	)	
	)	
AMERICAN CASUALTY CO. OF READING PA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the November 29, 2012, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

APPEARANCES

Derek R. Chappell, of Ottawa, Kansas, appeared for the claimant. James R. Hess, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the stipulations and considered the same record as did the ALJ, including the transcript of preliminary hearing dated November 28, 2012, with the exhibits attached, and the documents filed of record with the Division.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's request for medical benefits stating his carpal tunnel syndrome existed prior to starting work for respondent and became symptomatic while working for respondent. Under the language of K.S.A. 2011 Supp. 44-508(f)(2), compensation would be denied.

The claimant requests review of whether the ALJ erred in finding that his carpal tunnel syndrome preexisted his employment and was simply aggravated by the repetitive use of his upper extremities in the course of his employment. Claimant contends that the Order should be reversed as the ALJ exceed his authority in creating his own prevailing factor logic based solely on one work analysis in an EMG report.

Respondent argues the Order should be affirmed, arguing claimant failed to satisfy his burden of proving by a preponderance of credible evidence that he suffered an accidental injury within the course and scope of his employment with respondent or that he is entitled to benefits for this alleged injury.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed and remanded for further proceedings.

Claimant began working for respondent on September 26, 2011. He underwent a pre-employment physical on September 23, 2011, before he began working for respondent. The physical took place at a physician's office in Ottawa. The physical examination included claimant's wrists, hands and arms during which his grip strength was tested. Claimant's grip strength was measured at 10 pounds on the dynamometer. The grip test was repeated eight times. Claimant passed the physical with this measurement. He denied having any pain, numbness, tingling or symptoms of any kind in his hands, wrists or arms before or at the time of this test.[1]

Claimant testified that, while working for respondent, he did steel work for structures like malls, as a fabricator. As a fabricator, claimant did a lot of grinding and used propane powered hand torches on a regular basis. He also utilized a chipper and a hammer to remove slag, and has to use quite a few hand tools. The tools he utilized required the use of both hands. On average, he used a hand grinder eight hours out of his ten hour day.[2] Claimant stated the grinder is not an easy tool to use and it vibrates constantly while it is gripped. He also indicated that this work required him to regularly put his hands and wrists in awkward or different positions.[3] Claimant worked second shift, 10 hours a day, five days a week and sometimes worked overtime on Saturdays.

Claimant testified that the symptoms in his hands, wrists and arms just started one day and eventually got the point where he hurt so much he had to stop working and take

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[1] P.H. Trans. at 9.

[2] *Id.* at 12.

[3] *Id.* at 13.

a break. Claimant testified that it was around December 15, 2011, when he really began to notice the increased symptoms. He reported to his supervisor, Billy Mitchell, that his hands were hurting and he needed help. He was instructed to talk with Caleb Lidberg, the nighttime manager. Claimant again reported that his hands were hurting and wondered if there was some other job he could do to ease his pain.[4] He also spoke with Pat, the safety person, about his hand pain. Claimant testified that Pat is also in charge of arranging doctor visits. Pat told claimant he would see about getting claimant off of the grinder. It took about a week before claimant was sent to see Dr. McCalla. Claimant met with Dr. McCalla on March 26, 2012. The week before the exam, claimant was moved to beveling using a track burner.

Claimant testified that he doesn't know why Dr. McCalla's records show that his hands started hurting in July or August 2011 and he felt that she was simply confused. Claimant was given a prescription for a wrist splint and the restriction of no lifting over five pounds and no repetitive lifting. Those restrictions prevented him from doing the beveling job. Claimant was put in the office and told to read a book. By May or June, he was not sure of the exact date, he was terminated.

Before the office job, claimant was assigned to scrubbing walls, but it was too much for his wrists. He wore braces 24 hours a day and they were very tight and the combination of the braces and scrubbing aggravated his wrists. Claimant scrubbed walls with a toilet brush eight hours a day for a week.

Claimant was sent to Dr. Brad Storm who found early signs of carpal tunnel syndrome. Dr. Storm opined that claimant's work was not the prevailing factor in causing the carpal tunnel syndrome, because claimant had the numbness and tingling within a few weeks of starting the job. Claimant was sent for an EMG to determine if the carpal tunnel syndrome was acute or chronic and was placed on light duty. On April 17, 2012, Dr. Kimberly Cochran performed an NCT/EMG. The tests identified claimant's condition as chronic carpal tunnel syndrome. Dr. Storm determined that claimant's condition, being chronic, was not caused by his work. In his opinion, the job claimant was performing for respondent was not the prevailing cause of claimant's carpal tunnel syndrome, although he agreed it could be an aggravation. He opined that maybe claimant simply was not able to perform this particular type of work.

Soon after, claimant was notified that his claim was being denied by the insurance carrier. Claimant then began seeing his family physician, Dr. Nichols, for his carpal tunnel syndrome and was sent to orthopedic and sports medicine specialist, Larry W. Harris, M.D., an upper extremity specialist. Dr. Harris opined that claimant's carpal tunnel

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[4] *Id.* at 16.

syndrome was most likely caused by the excessive use of his hands on a grinder during his work with respondent.[5]

Claimant was also examined on September 6, 2012, by hand surgeon Lynn D. Ketchum, M.D., who opined that claimant had carpal tunnel syndrome, left worse than right with no symptoms prior to working for respondent. Because claimant used heavy vibrating equipment all day long, it was Dr. Ketchum's opinion that the prevailing factor in causing claimant's bilateral carpal tunnel syndrome was his work with respondent.[6] He opined that claimant was in need of bilateral carpal tunnel releases.

Since being terminated by respondent, claimant has found a job at Ernest Spencer Metals, a steel powder coating company. This job requires claimant use a manual sandblaster to blast rust off of steel. The blaster is a two inch hose that drapes over the shoulder and has a lever that is flipped to release steel shot. Claimant testified that this job is much easier on his hands. Claimant works four 10 hour days for Ernest Spencer Metal. He sometimes works more than 50 hours a week.

Claimant testified that his hands and arms still fall asleep sometimes, and he still has pain. But, it is not as bad as when he was grinding. He continues to wear his arm braces when he sleeps.

Claimant denies having any problems with his wrists, hands and arms before working for respondent in September 2011. He did, however, do grinding work for five years at Horizons Systems, Inc., before going to work for respondent. But that grinder was a lighter machine and was easier to use.

On cross-examination, claimant acknowledged that he had been written up by respondent for job performance on December 12, 2011, just before he advised respondent of his hand problems. Claimant testified that he was slow doing a particular job because his hands were hurting him. He also agreed that he sometimes assisted others with automobile repair and had recently purchased a tattoo equipment set. He would tattoo for several hours on one job, but would take numerous breaks.

Susan Massey, HR coordinator for respondent, testified that claimant's employment was terminated after he did not return from a 30-day medical leave period. The original December 12, 2011, disciplinary writeup resulted from claimant taking too long on a job, and "loafing off".[7]

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[5] *Id.* at 24; Cl. Ex. 4 at 2.

[6] *Id.*, Cl. Ex. 5 at 2.

[7] *Id.* at 56.

Patrick Karigan, safety coordinator and head of maintenance for respondent, testified he was involved in handling claimant's restrictions and tried to fairly accommodate him. He had claimant alternate different jobs during the course of the work day. Mr. Karigan testified that claimant had problems with some of the jobs bothering his hands and claimant expressing that he did not want to do those jobs.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 508(e)(f)(1)(2)(A)(B) states:

> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
> In no case shall the date of accident be later than the last date worked.
> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury

> may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
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> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

This record supports the ALJ's determination that claimant only worked for respondent for two to three months before developing carpal tunnel syndrome which has been described by the doctors as chronic. However, claimant underwent a pre-employment physical and passed even the grip test portion. There is no indication that claimant had any prior hand problems, even while working for five years at a hand intensive job. Claimant did testify that the prior job involved the use of equipment which was lighter and not as difficult to handle.

Two of the examining physicians found claimant's job with respondent to be the prevailing factor in the development of the carpal tunnel syndrome. Only Dr. Storm disagreed, describing claimant's here-to-fore asymptomatic condition as chronic. He acknowledged the job could have aggravated claimant's condition.

Claimant has obtained employment with a company that requires he use a sand blaster. This new job does not bother claimant's hands as much as the job with respondent. Claimant testified his hand condition had improved since leaving respondent.

The ALJ appears to find that claimant's carpal tunnel syndrome pre-existed his employment with respondent. However, there is no medical evidence supporting this finding, other than Dr. Storm's opinion that the asymptomatic carpal tunnel syndrome is chronic. This, coupled with the total lack of symptoms before claimant began working for respondent and claimant's ability to pass the pre-employment physical, convinces this Board Member that claimant has satisfied his burden of proving he suffered personal injury

by repetitive trauma while working for respondent. The Order of the ALJ is reversed and the matter remanded for further proceedings consistent with this order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving he suffered personal injury by repetitive trauma while working for respondent, resulting in the development of carpal tunnel syndrome. The Order of the ALJ denying benefits is reversed and the matter remanded to the ALJ for further proceedings consistent with this Order.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated November 29, 2012, is reversed and the matter remanded to the ALJ pursuant to the above holdings.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

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HONORABLE GARY M. KORTE
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge

[8] K.S.A. 2011 Supp. 44-534a.